IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 537 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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IJARUL HAQ ABDUL HAMID SHAIKH - Applicant(s)

Versus

THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

MR HARIN P RAVAL for Applicant(s) : 1,
MR HM PRACHCHHAK APP for Respondent(s) : 1,
MRS VASAVDATTA BHATT for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 19/09/2005

ORAL JUDGMENT

1. Rule. Mr. HM Prachchhak, learned APP appears and waives service of notice of rule on behalf of

respondent No.1 – State whereas Ms. Vasavadatta Bhatt, learned Additional Central Government Standing Counsel appears and waives service of notice of rule on behalf of respondent No.2.

2. Since the issue involved in this revision application is in a narrow compass, by the consent of the learned advocates appearing for the patters, the revision application is taken up for final hearing today itself.

3. By filing instant petition under Section 397 read with Section 401 of the Code of Criminal Procedure ('the Code' for short), the petitioner/ original accused seeks to challenge the order dated 31.7.2004 recorded below Ex.1 in Criminal Appeal No. 34 of 1990 by the learned Additional Sessions Judge, Valsad District at Valsad by which the appeal filed by the petitioner came to be dismissed for default without deciding it on merits on the ground that the petitioner did not

remain present at the time of hearing of the appeal.

4. Respondent No.2 filed a complaint being Criminal Case No.1 of 1985 in the Court of the learned Additional Chief Judicial Magistrate, Valsad at Valsad against the petitioner and one Abdullah Abdul Gaffur Kazi, inter alia, contending that on the basis of the specific information, the Superintendent of Customs, Valsad and other customs officers of Valsad had searched the godown situated on Survey No.78 of village Dhanoli on 10.2.1984 at about 1 P.M. and recovered 208 packages of contraband goods viz., video cassette recorders, wrist watches, fabrics, etc., valued at Rs.85,91,080/- It was the further case of the prosecution that the said godown was of the ownership of the petitioner and that the petitioner was allegedly in possession and in control of the said godown and had stored and concealed the contraband goods in the godown. It

was the further case of the prosecution that the goods were stored by the petitioner in connivance with accused No.2 and that accused No.2 had aided and abetted the petitioner in the offence of the storage and concealment of the smuggled goods. According to the case of the prosecution, as no documents suggesting import of the above goods were found from the packages or from the said godown and as no explanation was produced by the petitioner, the said contraband goods were seized in the reasonable belief that the goods were smuggled goods and were liable for confiscation under the provisions of Customs Act, 1962 ('the Act' for short). As per further case of the prosecution, the goods were in 208 packages and looking the locality and the number of packages, it was not possible to make a spot Panchnama of the seizure and therefore the aforesaid goods were brought in two trucks to the Customs Office, Valsad in the presence of two Panch witnesses and that the regular Panchnama was carried out by the

Customs Officer, Valsad in the presence of Panch witnesses. Thereafter the Collector of Customs, Gujarat had in exercise of the powers conferred upon him under Section 137 (1) of the Act had accorded sanction to prosecute the accused for the offence committed by the petitioner and another accused under Section 135 of the Act. Accordingly the petitioner as well as another accused was charge-sheeted in the Court of the learned Additional Chief Judicial Magistrate, Valsad for commission of the alleged offence under section 135 of the Act.

5. Since the accused pleaded not guilty to the charge framed against them, the trial commenced against them and they were put on trial. Considering the prosecution evidence, at the end of the trial, the learned Additional Chief Judicial Magistrate, Valsad found the accused guilty of the charge levelled against them and accordingly he recorded the order of conviction

and sentence vide an order dated 27.8.1990 convicting the petitioner as well as another accused for commission of the offence under Section 135 of the Act and both of them were sentenced to suffer R.I. For four years and to pay fine of Rs.45,000/- and in default of payment of fine, they were ordered to suffer further R.I. for six months.

6. Aggrieved thereby the petitioner went in appeal in the Sessions Court, Valsad and the said appeal came to be registered as Criminal Appeal No. 34 of 1990 which was heard by the learned Additional Sessions Judge, Valsad at Valsad. At the time of hearing of the appeal, the learned advocate who had filed appearance and appeared on behalf of the petitioner declared by filing a pursis at Ex.26 that the petitioner went abroad and he was absconding and therefore he did not want to continue as the advocate of the petitioner. Thereafter also the learned

Additional Sessions Judge issued warrant against the petitioner and the learned Special P.P. declared him absconding and, therefore, the learned Additional Sessions Judge dismissed the appeal on the ground that the appellant did not remain present at the time of hearing of the appeal, without deciding it on merits, which has given rise to the present petition at the instance of original accused No.1.

7. Mr. Harin P. Raval, learned advocate of the petitioner, has contended that it is true that at the time of hearing of the appeal the petitioner was not in India and therefore he could not remain present before the Court nor he could give instructions to his lawyer which has resulted in passing the impugned order. However, according to him, the learned appellate Judge ought not to have dismissed the appeal for default without deciding it on merits. The learned appellate Judge ought to have engaged an advocate as amicus

curiae or he ought to have given an advocate in legal aid who could have argued the the appeal on merits. It is settled principle of law that no matter can be thrown overboard without deciding it on merits and more particularly so far as criminal appeal is concerned, it cannot be dismissed without deciding it on merits even in the absence of the accused/appellant or in the absence of his lawyer. He also contended that at present the petitioner has surrendered to the judicial custody and he is very much available and he would be available at the time of hearing of the appeal. He has also engaged a local lawyer Mr. Ayaz Shaikh who would represent his case and shall remain present in the Court on the dates on which the appeal would be notified for hearing from time to time and thereafter on all adjourned dates on which the appeal would be notified for hearing.

8. In this connection, Mr. Raval, learned

advocate of the petitioner has relied upon the following reported decisions of the Supreme Court:

(i) Rishi Nandan Pandit and others v. State of Bihar, AIR 1999 SC 3850;

(ii) Bani Singh and others v. State of U.P. AIR 1996 SC 2439;

(iii) Kabira v. State of Uttar Pradesh, 1982 SCC (Cri.) 144;

(iv) Ram Naresh Yadav and others v. State of Bihar, AIR 1987 SC 1500.

9. In the aforesaid premises, according to Mr. Raval, the impugned order passed by the learned Additional Sessions Judge dismissing the appeal for default and not deciding it on merits, deserves to be quashed and set aside by allowing

this petition and thereby restoring the Criminal Appeal No.34 of 1990 to its original file on the record of the learned Additional Sessions Judge, Valsad District at Valsad, for deciding it in accordance with law after giving opportunity of hearing to the learned advocate of the petitioner. He, therefore, urged to allow this revision application.

10. Mr. HM Prachchhak, learned APP for respondent No.1 - State and Ms. Vasavadatta Bhatt, learned Additional Central Government Standing Counsel for respondent No.2/original complainant urged that in view of the settled principles of law enunciated by the Supreme Court in catena of decisions, appropriate orders may be passed by restoring Criminal Appeal No. 34 of 1990 to the file of the learned Additional Sessions Judge, Valsad District at Valsad for deciding it on merits after giving opportunity of hearing to the learned advocate engaged by the petitioner.

11. So far as factual matrix is concerned, there is no dispute that the petitioner and another accused was charge-sheeted for commission of offence under Section 135 of the Act in the Court of learned Additional Chief Judicial Magistrate, Valsad and at the end of the trial both of them were convicted and sentenced for commission of the offence under section 135 of the Act and they were ordered to suffer R.I. for four years and to pay fine of Rs.45,000/- and in default of payment of fine, they were ordered to suffer R.I. for further six months. Aggrieved thereby the petitioner had filed an appeal in the Sessions Court, Valsad which was registered as Criminal Appeal No.34 of 1990 which was heard by the learned Additional Sessions Judge, Valsad at Valsad. At the time of hearing of the appeal, the learned advocate who represented the petitioner filed a pursis at Ex.26 inter alia stating that the petitioner went abroad and therefore he did

not want to continue as his advocate and thereupon the learned appellate Judge also issued warrant against the petitioner and since he had gone abroad it could not be served upon him and thereafter the learned Special PP stated that the petitioner has been declared as absconding. After recording the aforesaid facts, the learned Additional Sessions Judge, Valsad dismissed the appeal since the petitioner did not remain present at the time of hearing of the appeal, without deciding the appeal on merits.

12. It is settled principle of law that no matter can be thrown overboard without deciding it on merit and more particularly in the case when the advocate representing the accused declares that he did not want to continue as advocate of the accused and in that contingency so far as criminal matters are concerned, it is the duty of the learned appellate Judge to engage advocate as amicus curiae or provide legal aid to him to

represent his case and to assist the court and thereafter the court ought to have recorded the judgment on its own merits. In the instant case the learned appellate Judge has not adopted this course.

13. In the case of Rishi Nandan Pandit (supra), the Supreme court has held that non-appearance of counsel engaged by the accused at the time of hearing of appeal does not envisage dismissal of appeal for default but the appeal to be decided by appointing another counsel as amicus curiae. In that case the High Court confirmed conviction and sentence on mere scrutiny of evidence and relying upon statement made by prosecution witnesses before Investigating Officer. The Supreme Court has held that the High Court has committed miscarriage of justice. The Supreme Court set aside the said judgment of the High Court and the matter was sent back to the High Court for deciding it afresh. The Supreme Court

therefore quashed and set aside the impugned order of the High Court and held that the appeal filed by the appellant before the High Court will stand restored for fresh disposal in accordance with law.

14. In the case of Bani Singh (supra) the Supreme Court has observed as under:

> “It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Ss. 385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the

judgment of the trial Court. The plain language of Ss.385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record."

15. In the case of Kabira (supra) the Supreme Court has held that the Court should not dismiss the appeal merely on non-appearance and instead, should appoint an advocate amicus curiae and then proceed to dispose of it on merits.

16. In the case of Ram Naresh Yadav (supra) the Supreme Court has held that dismissal of the appeal against the order of conviction for non-prosecution is permissible but appeal cannot be disposed of on merits unless the accused or his counsel are heard.

17. Applying the principles laid own by the Supreme Court in the above referred to judgments to the facts of the present case, there is no manner of doubt that the appeal was dismissed for non-prosecution as appellant went abroad and did not remain present at the time of hearing of the appeal as well as the advocate engaged by him had filed pursis that he did not want to continue as the advocate of the accused and did not want to proceed with the hearing of the appeal. In sum and substance, the appeal was not decided on merits. Therefore, the learned appellate Judge had no opportunity and occasion to examine the impugned judgment and order of conviction and

sentence recorded against the petitioner, on merits.

18. In view of the settled principles enunciated by the Supreme Court in the above referred to judgments to the facts of the present case, the learned appellate Judge was duty bound to engage an advocate as amicus curiae or provide an advocate in legal aid scheme to represent his case and also to assist the Court and thereafter ought to have heard and decided the appeal on merits.

19. Mr. Harin Raval, learned advocate of the petitioner, states that the petitioner has already surrendered to jail authority and he has engaged a local lawyer Mr. Ayaz Shaikh, who would regularly remain present on all the dates on which the appeal would be notified for hearing before the Sessions Court.

20. In aforesaid view of the matter, according to this court, since the appeal was not heard on merits, the impugned order deserves to be quashed and set aside and the appeal deserves to be remitted to the learned Additional Sessions Judge, Valsad District at Valsad for deciding it afresh on merits.

21. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order dated 31.7.2004 recorded below Ex.1 in Criminal Appeal No.34 of 1990 by the learned Additional Sessions Judge, Valsad District at Valsad is hereby quashed and set aside and the Criminal Appeal No.34 of 1990 is ordered to be restored to its original file. The learned Additional Sessions Judge, Valsad District at Valsad shall now hear the appeal on its merits by notifying the date of hearing. It is expected that the petitioner's advocate Mr. Ayaz Shaikh will remain present in the Court on

the dates on which the appeal would be notified for hearing and will cooperate for expeditious disposal of the appeal. It is expected of the learned Additional Sessions Judge, Valsad District at Valsad that he shall dispose of the appeal as expeditiously as possible and preferably on or before 31.12.2005.

22. Rule is made absolute. Direct service is permitted.

(A.M. Kapadia, J.)

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